SUPREME COURT, U. S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1416

LYDIA AGUAYO, RUTH BOWEN, HELEN POSNER, EDNA VEAL, NILSA SANTANA, and HYACYNTH CADOGAN; individually, on behalf of their minor children, and on behalf of all other persons similarly situated,

—and—

CITY OF NEW YORK and JULE SUGARMAN, Commissioner of the Department of Social Services for the City of New York,

—and—

UPSTATE WELFARE RIGHTS ORGANIZATION, CITYWIDE COORDINATING COMMITTEE OF WELFARE RIGHTS GROUPS, ROCKLAND COUNTY WELFARE RIGHTS ORGANIZATION, BROOKLYN WELFARE ACTION COUNCIL, WELFARE RECIPIENTS ACTION GROUP OF RED HOOK, SUNSET PARK WELFARE RIGHTS ORGANIZATION, and UNITED WELFARE LEAGUE,

Petitioners,

—against—

ELLIOT L. RICHARDSON, Secretary of the United States Department of Health, Education and Welfare; JOHN D. TWINAME, Administrator, Social and Rehabilitation Service; and ELMER SMITH, Regional Commissioner, Social and Rehabilitation Service; individually and in their official capacity; and THE UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE,

—and—

ABE LAVINE, individually and in his official capacity as Commissioner of Social Services of the State of New York; and THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY MEMORANDUM OF INDIVIDUAL AND ORGANIZATIONAL PETITIONERS

ADELE M. BLONG
STEVEN J. COLE
HENRY A. FREEDMAN
NLSP Center on Social Welfare Policy & Law, Inc.
25 West 43rd Street
New York, New York 10036
Tel.: (212) 354-7670
Attorneys for Individual and Organizational Petitioners

In the

Supreme Court of the United States

October Term, 1972

No. 72-1416

Lydia Aguayo, *et al.*,

—and—

City of New York, *et al.*,

—and—

Upstate Welfare Rights Organization, *et al.*,

Petitioners,

—v.—

Elliot L. Richardson, *et al.*,

—and—

Abe Lavine, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY MEMORANDUM

The state respondents in their opposing brief:

1. Misstate the current status of this matter in the United States District Court for the Southern District of New York.

2. Misstate their present plans regarding implementation of the two projects which are at issue herein.

3. Misstate the applicability of this court's decision in *New York State Department of Social Services* v. *Dublino*, —— U.S. ——, 93 S. Ct. 2507 (1973), to the issues raised by the petition herein.

Current Status of the Projects and Lower Court Action

The state respondents have stated that "a second application for a preliminary injunction is *sub judica* (sic) in the District Court" (Brief in Opp., p. 5*).

This is untrue. This matter was disposed of by the District Court on August 29, 1973. In addition, such request for injunctive relief was addressed to matters separate and apart from the issues raised by the petition for certiorari, and could not have afforded petitioners the relief which they seek by their request to this Court.

As noted in our petition, p. 15, the decision of the Court of Appeals *modified* the decision of the district court denying injunctive relief and affirmed such decision as so modified. Neither the federal nor state respondents petitioned for review from that aspect of the court's decision. In brief, this modification required the state respondents to provide payment to recipients for all expenses which they are required to incur solely because of their compelled participation in the projects, and to rescind their previous instruction subjecting individuals to a 30 day suspension

* All references to the state respondents' brief in opposition are to such brief as submitted in typed form on or about December 19, 1973. Petitioners are aware that the court has requested submission of printed copies but we have not yet received the brief in printed form.

of aid as a penalty for an act of non-cooperation with project requirements. Subsequent to the decision of the Court of Appeals, petitioners sought an injunction from the District Court to restrain implementation of the projects until the project procedures had been revised to assure that the project operations would conform to the requirements therefor established by the Court of Appeals' modification.

The state respondents are now, and have been since February 20, 1973, free of any judicial restraint with regard to implementation of the projects. Petitioners first sought injunctive relief to enforce the decision of the Court of Appeals in March of 1973 but state respondents repeatedly sought extension of their time to respond on the grounds that they were then preparing revised procedures which would be submitted to the court as soon as they were completed and that they would voluntarily withhold implementation of the projects until such procedures had been so submitted and approved. When such procedures were not forthcoming by June 28, petitioners requested the court to proceed to disposition of the matter, and on or about July 19 the state respondents filed a memorandum in opposition. On August 29, the court, Cooper, J., held that the Court of Appeals decision was "self-executing" and that issuance of an injunction by it was not warranted since it had "no reason to doubt the good faith of the state to follow the mandate of the Circuit."

The state respondents are currently proceeding with plans for implementation of the Public Service Work Opportunities Project (PSWOP). It does appear, however, that they have abandoned their plans for implementation of the other controverted project, Incentives for Indepen-

dence (IFI), described at pp. 10-11 of our petition. Notwithstanding their continued reference to such project in their brief in opposition, they have advised the United States Department of Health, Education and Welfare by letter of November 5, 1973 that they were withdrawing such project. Of course, the delay of the state respondents in revising the project procedures for PSWOP and starting up such project makes it possible for this court, if it grants our petition for certiorari, to hear and determine the issues raised before the matter becomes moot by expiration of the project life. PSWOP has been approved for operation for a minimum of one year.

Relevance of This Court's Decision in New York State Department of Social Services* v. *Dublino

State respondents declare in their brief in opposition that the petitioners' "principal contentions" are that "all work programs must be governed by the WIN legislation" (Brief in Opp., p. 7), and that therefore, our principal contentions were disposed of unfavorably by this Court in *New York State Department of Social Services* v. *Dublino*. This declaration reveals a total lack of comprehension of the nature of the petitioners' claims, as well as a serious misunderstanding of the import of this court's decision in *Dublino*.

First, petitioners have never placed *principal* reliance on the conflicts between these projects and §402(a)(19) of the Act. As expressed in our petition, we have contended that the requirements imposed under the project are in violation of §402(a)(19) and that the evidence demonstrates that the Secretary of Health, Education and Welfare failed to consider whether and the extent to which such conflicts did exist, and further, failed to take the procedural action

necessary to specifically delineate the extent to which the state was authorized to depart from such requirements, and that these failures were part of the Secretary's overall failure to fully consider all relevant facts and otherwise comply with the requirements for decision-making under §1115 of the Act. We further contended in our petition that the Court of Appeals deliberately sought to free the Secretary from acting in accordance with law by accepting that the projects did pose conflicts with §402(a)(19) but nonetheless holding that it would "elevate form over substance" to require the Secretary to expressly waive §402(a)(19) as a precondition for authorizing state action inconsistent with such requirement. (See Petition for Certiorari, part 3(c), pp. 36-41.) However, this argument forms but one point in our argument as to the invalidity of the standard for administrative action established by the Court of Appeals in this case. Even if one were to assume that the force of this argument is weakened by this Court's decision in *Dublino,* therefore, this would affect no more than one part of one of the three substantial questions raised in the petition.

Secondly, as this Court specifically recognized in *Dublino,* the fact that a state is not completely barred from establishing its own work rules as a condition of eligibility for AFDC benefits does not mean that a state is free to do anything and everything in the name of a work program. Where a state proposes implementation of a state work rule in the basic statewide program, the Secretary of HEW is obligated to determine whether any specific aspect of such requirements conflicts with any provision of the Social Security Act including §402(a)(19) and in the event that he finds any such conflicts, the state would, of course, to

that extent be precluded from going forward with such requirements. (93 S. Ct., at 2517-2518.)

The Secretary is similarly obligated to determine the existence of such conflicts where a state proposes establishment of a work program as a §1115 project. Even assuming *arguendo* that he may allow the state in such a project to proceed with a provision which would otherwise be barred in the statewide program, he must nonetheless, under the terms of §1115, determine whether any such conflicts exist and must clearly and specifically exercise his waiver power under such section to establish the extent to which he has purported to free the state from the requirements of the Act. (See Petition, p. 38.) Absent such waiver, any individual affected by a project requirement which was in conflict with the Act should properly be able to refuse to comply since its implementation in the project would be no less illegal than if it were to be implemented in the statewide program. Accordingly, the Secretarial "approval" of these projects without a determination as to such conflicts is as invalid now as it was prior to this Court's decision in *Dublino*. However, if the erroneous holding of the Court of Appeals on this point is allowed to stand, it not only establishes an incorrect rule of law but it acts to bar petitioners from the relief to which they are legally entitled on this point.

Thus, the Court of Appeals has authorized implementation of the project requirements in toto (except as modified as discussed above) without any further consideration of, or need for, authorization for the resulting departures from the statutory requirements. Contrary to the suggestion of the state respondents that the district court could reopen the question of conflicts between the project and un-

waived requirements of Title IV (Brief in Opp., p. 10), the Court of Appeals has held that project requirements which violate §402(a)(19) may be imposed despite the absence of a waiver of all or any part of such provision. Moreover, the holding of that court in this regard would extend to violation of any other provision of the Act so long as the violating condition was fairly stated in the project application. This decision is no less than a blanket authorization for any and all violations of the Act notwithstanding the absence of any statement of secretarial recognition of and authorization for such violation in the manner and form prescribed by §1115.

Accordingly, although this court's decision in *Dublino* may have established that the extent of the conflict between the project and the Act is not as great as petitioners originally contended, the essential issue raised in question 3, paragraph (c), remains worthy of certiorari—can the Secretary validly exercise his authority under §1115 by approving a project in generalities without specifically dealing with the question of what waivers are required and proper under §1115(a).

Respectfully submitted,

ADELE M. BLONG
STEVEN J. COLE
HENRY A. FREEDMAN
NLSP Center on Social Welfare Policy & Law, Inc.
25 West 43rd Street
New York, New York 10036
Tel.: (212) 354-7670
Attorneys for Individual and Organizational Petitioners